Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

ALPHEUS RAY BROKAW,

Petitioner

v.

QUALCOMM, INC.,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

QUESTIONS PRESENTED

I. **Rule (7)(b)(1).** May a court rule that an employee's prima facie case of age discrimination is insufficient before trial without any motion notice of that defense by either the court or employer [(as required by Federal Rule of Civil Procedure (7)(b)(1)] where the court stated that the employee was replying to the employer's reply brief, which would be impossible?

II. **Hearsay evidence.** In a disparate treatment age discrimination case, is hearsay evidence that a replacement was doing the job after lay off sufficient to avoid summary judgment when, in addition, the employee was asked by his supervisor to train his replacement, he trained him, was thanked by his supervisor for training him, the replacement was doing the job at lay off, the job was necessary for continuance of that area of the company's work, and that area of work continued?

III. **Corporate admission.** To avoid summary judgment, does a prima facie case of age discrimination require that a corporate official admit that the employee was replaced since it could be argued that the laid off employee could not have personal knowledge after he was laid off?

IV. **Data disclosure.** In a large reduction in force, is an employer required to provide more data than just age and title of workers to a laid off employee to enable the employee to determine whether discrimination occurred?

V. **Statistical evidence.** Petitioner's court-accepted expert found that an employee over the age of 57 in the large reduction in force was 10 times more likely to be laid off than a younger worker, and that discrimination was likely by the odds of about 3.5 billion to one. May statistical evidence alone infer age discrimination to avoid summary judgment where the Fifth Circuit allows the inference but the Ninth Circuit refuses the inference?

VI. **California Code of Regulations § 260.140.41(f).** Petitioner, a non-college graduate, was solicited by telephone with the promise of substantial stock from his pension-paying job to work for non-pension paying Respondent. After starting work Respondent unilaterally prepared an alleged unconscionable vesting schedule (which Petitioner did not remember signing) which did not vest any stock until after 2 years and which vested 40% of the stock more than 5 years and 2 months later. May a trial court disregard **California Code of Regulations § 260.140.41(f)** which requires that employee stock options vest at least 20% per year, simply because no court has commented on the regulation?

VII. **California Government Code § 12941.1**. Under California's Fair Employment and Housing Act, does laying off an employee, while maintaining less qualified employees, six months before $400,000 in stock vests constitute age discrimination in light of California **Government Code § 12941.1** which includes salary differential as proof of age discrimination?

VIII. May an employer grant a benefit to any employee contingent upon future employment, and then terminate the employee to deprive him of the benefit?

PARTIES TO THE PROCEEDING

Petitioner
Alpheus Ray Brokaw

Respondent
Qualcomm, Incorporated

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OPINIONS BELOW

On December 21, 2004, the Ninth Circuit Court of Appeals issued its final unpublished opinion (Case No. 04-55198) affirming the district court's ruling of dismissal by summary judgment. A timely petition for rehearing en banc was denied on March 18, 2005 (Pet. App. at A1).

JURISDICTION

The certiorari jurisdiction of this Court is invoked in conformity with 28 U.S.C § 1254(1).

RELEVANT PROVISIONS

Federal Rule of Civil Procedure 7(b)(1) supports Petitioner's position that the appeals court erred in affirming the decision that Petitioner did not have a prima facie case of age discrimination, because that particular motion was not made or noticed to Petitioner. The controlling portion of Rule 7(b)(1) is set forth below:

> **Rule 7(b)(1)** An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Federal Rule of Civil Procedure 56(c) does not seem to exclude hearsay evidence in the context of motions for summary judgment. Rule 56(c) is set forth below:

Rule 56. Motions for Summary Judgment

56(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

California Gov. Code § 12941.1 provides that salary may be the basis for age discrimination. The controlling portion of 12941.1 is set forth below:

California Gov. Code § 12941.1

". . . The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group

> and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the states' statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. . ."

California Corporations Code § 25102 (o) states that the terms of any employee option plan or agreement shall comply with California Code of Regulations Section 260.140.41, and Corp. Code § 25102 (o)'s pertinent part follows:

> **California Corporations Code § 25102 (o).**
> The following transactions are exempted from the provisions of Section 25110:
>
> "(o) An offer or sale of any security issued by a corporation or limited liability company pursuant to a purchase plan or agreement, or issued pursuant to an option plan or agreement, where the security at the time of issuance or grant is exempt from registration under the Securities Act of 1933, as amended, pursuant to Rule 701 adopted pursuant to that act (17 C.F.R. 230.701), the provisions of which are hereby incorporated by reference into this section, provided that (1) the terms of any purchase plan or agreement

shall comply with Sections 260.140.42, 260.140.45, and 260.140.46 of Title 10 of the California Code of Regulations, **(2) the terms of any option plan or agreement shall comply with Sections 260.140.41, 260.140.45, and 260.140.46 of Title 10 of the California Code of Regulations, and (3) the issuer files a notice of transaction in accordance with rules adopted by the commissioner no later than 30 days after the initial issuance of any security under that plan, accompanied by a filing fee as prescribed by subdivision (y) of Section 25608** (emphasis added). . ."

California Code of Regulations § 260.140.41 provides that employee stock options shall vest at least 20% per year, and the pertinent part follows:

California Code of Regulations § 260.140.41

". . . **(f)** The right to exercise at the rate of at least 20% per year over 5 years from the date the option is granted. . ."

STATEMENT

A. Introduction

This case raises important questions in wrongful termination/age discrimination cases as to the sufficiency of evidence an employee must present to avoid summary judgment.

B. Material Facts and Procedural Summary

In 1995 Petitioner (Mr. Brokaw) was working as a senior design engineer at TRW when he was solicited by Mr. Weigel, the manager of mechanical engineering at Respondent (Qualcomm). Mr. Weigel promised substantial stock to leave the pension job at TRW. Mr. Brokaw said "I'll give you 5 good years if you give me the stock." The manager said, "That should not be a problem. We are all getting it." He attended the employee Christmas party in December, 1995.

Mr. Brokaw relied on the promise and began work at Qualcomm as a senior design engineer on January 29, 1996. Before that date he had never been told that he would lose his stock if he were laid off. Qualcomm defends by Qualcomm's Attorney Connaughton's declaration that Qualcomm prepared a document on Feb. 2, 1996, claiming that all options would be lost upon termination. Feb. 2, 1996, is after Mr. Brokaw started work.

Qualcomm unilaterally prepared a schedule that stated that Mr. Brokaw would not get any stock for over 2 years after starting work and would not get 40% of his stock until over 5 years and 2 months later. Petitioner's Complaint argued that California Code of Regulations §260.140.41(f) states that options must vest at not less than 20% per year and therefore, Qualcomm's entire restrictive schedule was illegal. Petitioner also argued that California Corporation's Code § 25102(o) requires compliance with CCR § 260.140.41. Petitioner argued that Qualcomm's vesting schedule of 40% of the stock more than 5 years and 2 months after starting work is unconscionable.

Mr. Brokaw did a great job for 4 ½ years and was laid off July 7, 2000. His unvested options were worth between $400,000 and $1,000,000 depending on market date.

Qualcomm profited by Mr. Brokaw's work and then kept the stock's appreciation of the promised benefit by lay off to deprive the subservient employee of the benefit, according to Mr. Brokaw.

Mr. Brokaw was asked to train Paul Repp, a younger worker, to replace him. Mr. Brokaw trained Mr. Repp who was performing his job when Mr. Brokaw left. In Mr. Brokaw's unit there were 440 engineers, of which 46 were laid off. The entire unit had only 17 engineers over the age of 57, and Qualcomm laid off 13 of them. Qualcomm retained 390 of the engineers under 57 years old. Therefore, an engineer in the Global Star Unit had a 10 times greater chance of being laid off if over the age of 57. A math expert declared that laying off 13 of the 17 workers over 57 years old was statistically unfair by Qualcomm by 3.1 billion to 1. Qualcomm said the reason Mr. Brokaw was that Mr. Brokaw's newer supervisor, Mr. Ellis, selected Mr. Brokaw for lay off as being unqualified and unneeded. However, an E-mail from the same supervisor, Mr. Ellis, stated that Mr. Brokaw was the only one who could do the job. Mr. Ellis said they were laying off the older workers and higher-salaried workers to save money. Qualcomm did not compare Mr. Brokaw's merits with either unit-wide or plant-wide engineers who were retained. In the plant were hundreds of other engineers who were allowed to keep their jobs. Mr. Brokaw never received a written notice of lay-off.

After Mr. Brokaw left he was told by several workers that his replacement was still doing Mr. Brokaw's job, which Mr. Brokaw declared in the trial court.

Twenty days before Mr. Brokaw started work, 2200 stock options were authorized to Mr. Brokaw by a vice-president and by Human Resources. The trial court refused to accept the authorization in Brokaw's favor in stating that Mr. Brokaw could not have known about that document before starting work (Pet. App. at C 10, C 11).

Qualcomm made multiple motions to dismiss, motions for summary judgment, motions to nullify Brokaw's deposition answers after two depositions, and other motions. The trial court dismissed several claims by motion to dismiss, and granted summary judgment as to the remaining claims.

REASONS FOR GRANTING THE WRIT

As shown below, the reasons for granting this writ include settling conflicts between this Court and also between courts's of appeal, and correcting errors that conflict with this Court's decisions.

A. Rule (7)(b)(1). A writ should be granted to correct the procedural error of summarily dismissing Petitioner's case without notice.

Federal Rule of Civil Procedure (7)(b)(1)] states that motions must state grounds with particularity. Petitioner's Complaints and Declarations alleged a prima facie case of age discrimination. Neither the trial nor Respondent made a particular motion to dismiss Petitioner's prima facie case. The purpose of the particularity requirement of Rule 7 is to afford notice of the grounds and prayer to both the court and to the opposing party with a meaningful opportunity to respond [*Registration Control Systems v. Compusystems, Inc.*, 922 F. 2d 805, 807 (Fed. Cir. 1990)].

However, as easily seen at Pet. App. at C 14, the trial Court, affirmed by the Ninth Circuit, stated that the employee was replying to the employer's reply brief, which would be impossible, because a reply brief is prepared after an opposition brief. Thus, Rule (7)(b)(1) was violated.

B. Hearsay evidence. This Court could assist age discrimination litigants on a national level by clarifying the type of evidence that can be used to avoid summary judgment. The affirmed trial court ruled that Petitioner has not proven that he was replaced, partly because Respondent did not admit replacement [Pet. App. at C 14 (Petitioner's witness lacked identity and authority to speak for Qualcomm)]. Brokaw did declare that his job was needed, he was the only person who could do his job, the work continued, and that for the work to continue, someone would have to be trained by him.

Federal Rule of Civil Procedure 56(c), cited above under "Relevant Provisions," refers to affidavits and that the respondent could have as few as 10 days to respond to a motion for summary judgment. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 152 (2000), this Court held that summary judgment is prohibited if a plaintiff has created an inference of age discrimination. *Reeves* was a Rule 50 dismissal as a matter of law after the case had been heard by a jury. Throughout *Reeves*, this Court referred to "sufficient evidence" and "inferences" as relating to prima facie cases of discrimination.[1] Here, Petitioner alleged that

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[1] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000): (The court must review all of the evidence in the record, cf., *e.g.*, *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986), drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence.)

after Petitioner was laid off, employees told him that they observed that Petitioner had been replaced. Hearsay evidence that is reasonably likely to be introduced at trial should be sufficient to avoid summary judgment. Petitioner also alleged that he was asked by his supervisor to train his replacement, he trained him, was thanked by his supervisor for training him, the replacement was doing the job at lay off, the job was necessary for continuance of that area of the company's work, and that area of work continued. The affirmed trial court held that Petitioner had not shown that he had been replaced.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154 (2000), Justice Ginsburg realized that some cases might require a clearer definition of sufficient evidence in prima facie cases.[2] She referred to *McDonnell Douglas*

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[2] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154, (2000), *Justice Ginsburg*, concurring:

> "The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal.
>
> I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion

Corp. v. *Green,* 411 U. S. 792, 802 (1973) as to the type of evidence that might be sufficient. However, *McDonnell Douglas* is race discrimination case that did not involve replacing an older worker.

If the employer is a corporation (although here apparently Respondent did not certify that it was a corporation until appeal), the employee cannot simply solicit current employees for evidence due to the attorney-client privilege. Therefore, forcing an employee to depose witnesses, during a summary judgment motion, for every fact that the employee could foresee a trial court's concern is too great a burden.

In an age discrimination case, a complaint need only state a brief statement of "claims upon which relief can be granted" under the ADEA [*Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 514, 515 (2002)]. But if an employee follows *Swierkiewicz* and only alleges that age discrimination occurred, then upon a summary judgment motion, the subservient employee is then forced to declare all elements of the claim and to quickly guess which corporate employees have information that can be quickly obtained by admission in a deposition, even if discovery is allowed at that time. Therefore, if reasonable hearsay evidence is not allowed to avoid summary judgment, an employer with superior bargaining power will have little reason to respect discovery procedures, and will be encouraged to hide elements of a claim that the employer knows exist, but which the employer believes is not yet in the hands of the employee.

At the pleading stage, hearsay evidence is direct

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for judgment as a matter of law. I anticipate that such circumstances will be uncommon."

evidence. Should this Court view hearsay evidence a part of a circumstantial evidence scheme, circumstantial evidence is accepted in all discrimination cases [(*Desert Palace, Inc. v Costa*, 539 U. S. 90, 100 (2003)].

C. Corporate admission. A writ should be granted in this age discrimination case because the lower courts seemed to require a corporate admission that the employee was replaced, which conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154 (2000).

As stated in the above discussion about hearsay evidence, the Ninth Circuit, by affirmance, has implied that a prima facie case of age discrimination seems to require an admission by the employer that an employee was replaced since the employee could not view his job after lay off (Pet. App. at C 14).

This evidentiary burden is contradictory to the above *Reeves* case which prohibits summary judgment if the plaintiff has created an inference of age discrimination.

D. Data disclosure. A writ should be granted to determine whether an employer is required to provide more data than just age and title of workers in a large reduction of force to a laid off employee to enable the employee to determine whether discrimination occurred. A writ should also be granted because the lower courts refused to consider Brokaw's following discrimination evidence because they were not specifically alleged in the First Amended Complaint: 1) evidence of being discriminated against with Qualcomm's illegal severance release, and 2) Brokaw's claim of insufficient data (Pet. App. at C 17, fn. 5). Requiring more than a brief statement of the

claim in a complaint violates this Courts holding in *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 514 (2002).

This is a matter of national significance because employers in this large country may periodically have reductions in force. The Ninth Circuit committed error in affirming the trial court, which held that Petitioner's statistics were insufficient when Petitioner used the only information provided by Qualcomm after requesting more information by interrogatory (Pet. App. at C 16).

Some of the requirements of the data that must be provided are found in the ADEA at 29 U.S.C. 626. Sections 626(f)(1)(H)(i) and (ii) require that an individual must be given information about the other workers as to their eligibility factors for the program, ages, and job classifications. Qualcomm did not compare Brokaw with other engineers in his unit as shown by Mr. Ellis' statement that he selected Petitioner for lay off among the few engineers under the Supervisor Ellis[3] (Pet. Apps. at C 14, C 15).

In *Wastak v. Lehigh Valley Health Network*, 333 F.3d 120, 134, fn. 9 (3rd. Cir. 2003), the court stated that 29 U.S.C. Sec. 626(f)(1) sets only minimum standards and that more is required in some cases.

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[3] In *EEOC v. Regents of the Univ. of Wis. Sys.*, 288 F. 3d 296, 302, 304 (7th Cir. 2002), the court found that 29 U.S.C. 623(a)(1) was inferred violated where the employer replaced older employees, no written justification for termination was prepared until after termination, and the evaluation was prepared without soliciting managers opinions or performing a formal evaluation. None of these duties were done in Brokaw's case which is a reckless disregard of age discrimination laws.

E. Statistical evidence. A writ should be granted to settle and clarify whether statistical evidence alone may infer age discrimination to avoid summary judgment where the Fifth Circuit allows the inference but the Ninth Circuit sometimes refuses the inference. Petitioner's court-accepted expert found that an employee over the age of 57 in the large reduction in force was 10 times more likely to be laid off than a younger worker, and that discrimination was likely by the odds of about 3.5 billion to one.[4]

In the present case, the trial court stated cited *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) in stating that statistics, standing alone, will not raise a triable issue of fact regarding pretext unless they show a stark pattern of discrimination unexplainable on grounds other than

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[4] In addition to overwhelming statistical evidence, Brokaw also produced an E-mail from his supervisor, Mr. Ellis, where Mr. Ellis seems to be arguing with his superiors that Brokaw shouldn't be replaced since he is the only one who can do the job. This refutes the finding that Mr. Ellis said Brokaw was not needed. Brokaw also alleged and declared that he was asked to train his replacement, the company continued after he left, and that only someone trained by him could do his job which was required for the company to continue. In addition, Brokaw declared and alleged that Qualcomm's stock vesting schedule was illegal as not vesting at least 20% per year per California Code of Regulations § 260.141.41. He also alleged California Gov. Code 12941.1 which allows salary differential as proof of age discrimination and as discussed in *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, fn. 29 (Cal. 2000). The trial court refused the Regulation claim and ignored the Gov. Code § 12941.1 claim.

Brokaw also alleged and declared that his severance offer was illegal as prohibiting future claims, awarding attorney's fees to a prevailing party upon suit, not providing valuable consideration to which Brokaw would not otherwise be entitled, paying similar workers a higher severance amount, and paying younger workers a "legal" severance while depriving Brokaw of severance due to an illegal severance waiver.

age (Pet. App. at C 16). However, Petitioner had used age and title, the only statistics that Qualcomm would provide. The trial court also cited *Pottenger v. Potlatch Corp.*,329 F.3d 740, 747 (9th Cir. 2003), but that case stated that it might have ruled for Pottenger if Pottenger had access to only 2 variables (*Pottenger*, Id. at 748). Both *Coleman* and *Pottenger* are distinguished because those employees added all employees into the statistics, regardless of job duties.

The Fifth Circuit stated that statistics alone will suffice to prove age discrimination [*Walther v. Lone Star Gas Co.*, 952 F. 2d 119, 125 (5th Cir. 1992)]. Therefore, now the U. S. Supreme Court should clarify between various circuit courts as to what type of statistical evidence is sufficient to avoid a summary judgment by an employer with superior bargaining and litigation power.

F. California Code of Regulations § 260.140.41(f). This Writ should be granted to determine whether federal courts may disregard state regulations simply because no court has commented on the regulation.

Petitioner, a non-college graduate, was solicited by telephone with the promise of substantial stock from his pension-paying job to work for non-pension paying Respondent. After starting work Respondent unilaterally prepared an alleged unconscionable vesting schedule (which Petitioner did not remember signing) which did not vest any stock until after 2 years and which vested 40% of the stock more than 5 years and 2 months later. **California Code of Regulations § 260.140.41(f)** which requires that employee stock options vest at least 20% per year. The affirmed trial court simply dismissed Petitioner's claim by stating that Petitioner had not stated any authority. The trial court did state

that the regulation did not apply to public corporations, but did not give any authority for that ruling.

Unless a state law is unconstitutional, federal courts are bound to abide by state laws [*Adderley v. Florida,* 385 U.S. 39, 46 (1966). Therefore, the affirmed trial court's refusal to uphold the 20%/year vesting rule in **California Code of Regulations § 260.140.41(f)** conflicts with the principle of respecting state laws as set forth by this Court.

G. California Government Code § 12941.1.

This Writ should be granted to determine whether the California Supreme Court has stated that California Government Code § 12941.1 includes salary differential as proof of age discrimination, but which the affirmed trial court here has ignored. Here, Petitioner was laid off six months before $400,000 of his stock vested (according to Respondent's unilateral and unconscionable schedule). Petitioner also declared that his supervisor told him "They were laying off the older and higher-paid workers."

California Government Code § 12941.1 includes salary differential as proof of age discrimination.

Salary motivation is actionable under FEHA (*Cal. Gov't Code Sec. 12941.1*). In *Guz v. Bechtel Nat'l Inc.*, 24 Cal.4th 317, fn. 29 (2000), the Court noted that because Plaintiff had not argued *Cal. Gov't Code Sec. 12941.1*, the Court said it would not consider it. Unless a state law is unconstitutional, federal courts are bound to abide by state laws [*Adderley v. Florida,* 385 U.S. 39, 46 (1966). Therefore, the affirmed trial court's refusal to uphold California's Fair Employment and Housing Act conflicts with the principle of respecting state laws as set forth by the U. S. Supreme Court.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decisions of the United States Court of Appeals for the Ninth Circuit, and hold that summary judgment is not proper under the factual and legal circumstances stated above.

Respectfully submitted,

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PETITIONER'S APPENDIX

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APPENDIX

CIRCUIT COURT ORDER DENYING REHEARING... A 1

CIRCUIT COURT DECISION..... B 1

DISTRICT COURT DECISION..... C 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 18 2005
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U.S. COURT OF APPEALS

No. 04-55198
D.C. No. CV-01-01172-DMS
Southern District of California,
San Diego

ALPHEUS RAY BROKAW,

Plaintiff - Appellant,

v.

QUALCOMM INCORPORATED; et al.,

Defendants - Appellees.

ORDER

Before: REINHARDT, BEEZER, and WARDLAW, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Wardlaw and Reinhardt vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P.35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

B 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 04-55198

D.C. No. CV-01-01172-DMS

ALPHEUS RAY BROKAW,

Plaintiff - Appellant,

v.

QUALCOMM INCORPORATED; et al.,

Defendants - Appellees.

Appeal from the United States District Court

for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Argued and Submitted December 8, 2004
Pasadena, California

Before: REINHARDT, BEEZER, and WARDLAW,
Circuit Judges.

Alpheus Ray Brokaw lost non-vested stock options upon his termination of employment from Qualcomm. Brokaw filed suit against Qualcomm, alleging numerous grounds for recovery, including age discrimination and contract-based claims. The district court dismissed several claims, and as to all remaining claims, granted summary judgment in favor of Qualcomm. We review these judgments of the district court *de novo*. *Solomon v. Interior Reg'l Hous. Auth.*, 313 F.3d 1194, 1196 (9th Cir. 2002); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

We have jurisdiction, and we AFFIRM.

Employment documents squarely establish that Brokaw was an at-will employee and that any stock options granted to him were scheduled to vest over a five-year period and expire shortly after the termination of his employment. These express agreements require us to affirm the district court's decisions on Brokaw's contract-based claims and his claims of promissory fraud, negligent misrepresentation, and unjust enrichment. *See Bank of America Nat'l Trust & Savs. Ass'n v. Pendergrass,* 48 P.2d 659, 661 (Cal. 1935) (holding that California law does not permit parol evidence of "a promise directly at variance with the promise of the writing"); *Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal.*, 94 Cal. App. 4th 151, 172 (Cal. Ct. App. 2001) (holding that an unjust enrichment claim cannot lie where "express binding agreements exist and define the parties' rights").

Written contracts govern the relationship between Brokaw and Qualcomm, thus Brokaw's implied contract claims also fail. *Halvorsen v. Aramark Uniform Servs., Inc.*,65 Cal. App. 4th 1383, 1390 (Cal. Ct. App. 1998).

Brokaw has failed to establish age discrimination. He has not identified a facially neutral employment practice or policy that adversely impacts older employees, and therefore has not established a prima facie case of disparate impact. He also has not demonstrated disparate treatment because he has not produced sufficient evidence showing that Qualcomm's justification for his termination was a mere pretext to conceal a discriminatory motive. *Coleman v. Quaker Oats Company,* 232 F.3d 1271, 1281, 1291 (9th Cir. 2000); *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 916 (9th Cir. 1997).

We have carefully considered each of Brokaw's remaining claims, which we find to be without merit.

AFFIRMED.

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORIA

BY "S/_____ DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALPHEUS RAY BROKAW,

Plaintiff,

vs.

QUALCOMM, INCORPORATED, and DOES 1 through 100, inclusive,

Defendant.

CASE NO. 01cv1172 DMS (AJB)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Doc. No. 90]

Plaintiff Alpheus Ray Brokaw ("Plaintiff") brings this civil action pursuant to 29 U.S.C. § 621, et seq. Plaintiff

alleges eight counts in his first Amended Complaint against Defendant Qualcomm Incorporated ("Defendant" or "Qualcomm"): (1) Negligent misrepresentation, (2) wrongful termination in violation of the Fair Employment and Housing Act ("FEHA"), (3) wrongful termination in violation of the Age Discrimination in Employment Act ("ADEA"), (4) wrongful termination in violation of public policy, (5) promissory fraud, (6) violation of California Business and Professions Code Section 17200, et seq., (7) unjust enrichment and (8) declaratory judgment.

I.
PROCEDURAL BACKGROUND

On June 29, 2001, Plaintiff filed his original complaint in this case. In response, Defendant filed a motion to dismiss. The court granted in part and denied in part Defendant's motion to dismiss, and allowed Plaintiff an opportunity to file an amended complaint.

Plaintiff filed a First Amended Complaint on April 2, 2002, in response to which Defendant filed another motion to dismiss. The court granted that motion as to Plaintiff's second and third causes of action to the extent they relied on a disparate impact theory, and dismissed those clams with prejudice. The Court denied Defendant's motion as to Plaintiff's other claims.

On January 21, 2003, Defendant filed its first motion for summary judgment or, in the alternative, for partial summary judgment. On March 14, 2003, the Court denied that motion without prejudice as premature.

Defendant filed the present motion for summary judgment on June 2, 2003. Plaintiff filed his opposition on June 23, 2003. Defendant filed its reply on June 27, 2003, along with objections to Plaintiff's evidence. On June 13, 2003, the Court found the present motion suitable for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1).

On October 6, 2003, this case was transferred from the calendar of the Honorable M. James Lorenz to the calendar of the Honorable Dana M. Sabraw.

II.
FACTUAL BACKGROUND

In October of 1995, Plaintiff was working as a senior mechanical design engineer for TRW. (Decl. Of Alpheus Ray Brokaw in Opp'n to Mot for Summ. J. ("Brokaw Decl.") at 3.) In November of 1995, Plaintiff had a telephone conversation with John Weigel, Manager of Mechanical Engineering at Qualcomm. (Id. At 3-4; Def.'s Mem. Of P. & A. in Supp. Of Mot. For Summ. J. at 10.) The following month, Plaintiff submitted an Application for Employment at Qualcomm. (Decl. Of E. Joseph Connaughton in Supp. Of Mot. For Summ. J. ("Connaughton Decl."), Ex. C.) That Application provided:

> In consideration of my employment, I acknowledge and agree that my employment may be terminated, with or without cause, and with or without advance notice, at any time at the option of either the Company or myself. I understand that no supervisor or representative of the Company other than the Office of the President has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing. (Id. At 44.)

On January 10, 1996, Qualcomm extended a written offer of employment to Plaintiff. (Connaughton Decl., Ex. D.) That letter offered Plaintiff an annual salary of $55,013.32, and also indicated that Defendant would ask the Board of Directors to offer Plaintiff "the opportunity to acquire 2200

shares of QUALCOMM stock through [its] Stock option Plan." (Id.) It further provided:

> The price of the stock options will be set at the average of the highest and lowest price at which the common stock was sold on the Thursday of the week you join the company. Options can generally be exercised in full in five years, and are subject to all terms and provisions of the plan. (Id.)

Attached to this offer letter was a document entitled "Terms of Employment." (Connaughton Decl.,

Ex. E.) That document reiterated that Plaintiff would be an at-will employee. (Id.) Plaintiff signed the "Terms of Employment" accepting the offer. (Id.) He also

signed a separate Employment Agreement. (Connaughton Decl., Ex. F.) Plaintiff started working at Qualcomm in January of 1996.

On February 2, 1996, Qualcomm granted Plaintiff the stock options referenced in the offer letter. (Connaughton Decl., Ex. G.) It detailed Plaintiff's options as follows: 440 exercisable shares would vest on February 2, 1998, 440 exercisable shares would vest on February 2, 1999, 440 exercisable shares would vest on February 2, 2000, and 880 exercisable shares would vest on February 2, 2001. (Id. at 55.) The Stock Option Agreement also stated that Plaintiff's options would terminate thirty days after the termination of his employment. (Id. at 56.) It further stated that nothing in the agreement "shall be deemed to create in any way whatsoever any obligation on your part to continue in the employ of the Company, or of the Company to continue your employment with the Company." (Id. at 57.) Plaintiff signed a form acknowledging receipt of the agreement on March 15, 1996. (Connaughton Decl., Ex. H.)

Plaintiff worked for Qualcomm until mid-2000. (First Am. Compl. At 6.) At that time Qualcomm had a large-scale reduction in force in which approximately 160 employees were separated from the company. (Def.s Mem. of P. & A. in Supp. Of Mot. For Summ. J. at 5.) On or about June 29, 2000, Plaintiff's manager, Robert Ellis, told him he would be included in the reduction in force, and his last day would be July 7, 2000. (First Am. Compl. At 6.) Mr. Ellis chose Plaintiff for inclusion in the layoff because the project he was working on was "mostly over" and because Plaintiff had minimal experience with the new engineering technology software. (Decl. Of Robert Ellis in Supp. Of Mot. For Summ. J. (Ellis Decl.") at 2.) Mr. Ellis did not consider Plaintiff's age or his stock options in selecting Plaintiff for inclusion in the layoff. (Id.)

Prior to leaving the company, Plaintiff was asked to train a younger worker, Paul Repp, which he did. (Id.) Mr. Repp assumed Plaintiff's job duties after Plaintiff left the company (Id.)

Around the time of Plaintiff's layoff, Defendant offered Plaintiff a severance package on the condition he waive certain claims. (First Am. Compl. At 7.) Although Plaintiff's severance package was conditioned on this waiver, younger employees were offered a severance package with no conditions. (Id.) Plaintiff refused to waive his claims, and did not receive a severance package. (Id. at 7-8)

III.
DISCUSSION

Defendant moves for summary judgment on all of Plaintiff's claims. It argues Plaintiff's claims for negligent misrepresentation and promissory fraud are barred by the statute of limitations, and Plaintiff has failed to establish the elements of these claims. Defendant further argues there is no

genuine issue of material facts as to Plaintiff's remaining claims.

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that summary judgment is proper. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The moving party must identify the pleadings, depositions, affidavits, or other evidence, which the moving party "believes demonstrates the absence of a genuine issue of material fact." Celotex corp. v. Catrett, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982).

The burden then shifts to the opposing party to show that summary judgment is not appropriate. Celotex, 477 U.S. at 324. The opposing party's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, to avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there is a genuine issue for trial . Id. More than a "metaphysical doubt" is required to establish a genuine issue of material fact." Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In cases such as this involving issues of motivation and intent, summary procedures should be used prudently. Palmer v. United States, 794 F.2d 534, 536 (9th Cir. 1986) citing Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981)).

Relief trough summary procedures, however, "may nonetheless be appropriate." Palmer, 794 F.2d at 536.

B. Negligent Misrepresentation

In Count One, Plaintiff alleges a claim of negligent misrepresentation.

To prevail on a negligent misrepresentation claim, a plaintiff must provide evidence of the following: 1) a representation as to a material fact; 2) that the representation is untrue; 3) that the defendant made the representation without a reasonable ground for believing it true; 4) an intent to induce reliance; 5) justifiable reliance by the plaintiff who does not know that the representation is false; and, 6) damage. In re Daisy systems Corp., 97 F.3d 1171, 1180 (9th cir. 1996) (citing Masters v. San Bernardino County Employees Retirement Ass'n, 32 Cal.app.4th 30, 40 n.6 (1995)). See also Glenn K. Jackson Inc. v. Rose, 273 F.3d 1192, 1200 n.2 (9th Cir. 2001) (citing Lincoln alameda Creek v. cooper Industries Inc., 829 F.Supp. 325, 330 (N.D. Cal. 1992)) (setting forth elements of negligent misrepresentation claim); Maneely v. General Motors Corp., 108 F.3d 1176, 1181 (9th Cir. 1997) (same). Defendant focuses on the first, second and fifth elements of this claim in its motion. It argues Plaintiff has failed to provide any evidence that Defendant made a misrepresentation as to a material fact, and also asserts that Plaintiff has failed to provide any evidence to show justifiable reliance.

In the First Amended Complaint, Plaintiff alleges five instances of negligent misrepresentation. First and second, Plaintiff alleges Defendant "was negligent in not telling Plaintiff when Plaintiff was offered work that Plaintiff would not receive 40% of his stock more than 5 years after starting work, and Defendants could deprive Plaintiff of his stock by terminating him at the will or whim of Defendants." (First Am. Compl. At 8.) Third Plaintiff asserts Defendant

negligently misrepresented "that Plaintiff would received [sic] stock options as part of his compensation and would not be terminated in the absence of cause." (Id. at 9.) Fourth, Plaintiff claims Defendant "negligently and falsely represented and promised to Plaintiff that if he accepted employment with Qualcomm, and as long as Plaintiff satisfactorily performed his job duties, Defendants would continue to employ Plaintiff, and pay to Plaintiff benefits, including, but not limited to, stock." (Id.) Fifth, Plaintiff implies Defendant promised him stock, not stock options, upon commencement of his work for Defendant. Although Defendant does not address these specific allegations, it argues Plaintiff has failed to offer any evidence of an express misrepresentation, therefore his negligent m misrepresentation claim fails. (Def.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 8.)

Case law in the Ninth Circuit and California supports Defendant's argument that an express representation is required for a negligent misrepresentation claim. See Pacific Ins. Co. v. Kent, 120 F.Supp.2d 1205, 1217 (C.D. Cal. 2000) (citing Diediker v. Peelle Fin. Corp., 60 Cal.App.4th 288, 297-98 (1997)) ("A negligent misrepresentation requires an affirmative representation that is false; an implied assertion or representation is not enough.") Plaintiff fails to provide this Court with any authority to the contrary, and he does not assert that Defendant owed him a duty to disclose. See First v. Allstate Ins. Co., 222 F.Supp.2d 1165, 1174-75 (C.D. Cal. 2002) (citing Scafidi v. Western Loan & Bldng. Co., 72 Cal.App.2d 550, 562 (1946) (stating an omission does not constitute misrepresentation absent duty to disclose).

Thus, even drawing all justifiable inferences in Plaintiff's favor, Defendant's alleged failure to inform Plaintiff that (1) he would not receive forty percent of his stock options until after completing five years of work, and (2) he would lose his stock options upon termination, does not amount to negligent misrepresentation.

To the extent Plaintiff alleges Defendant negligently misrepresented that he would receive stock options as part of his compensation, that claim also fails. As stated above, one element of a negligent misrepresentation claim is that the defendant made a false representation. See Maneely, 108 F.3d at 118 (stating plaintiff must prove defendant provided false information). In this case, Defendant does not dispute that it offered Plaintiff stock options as part of its offer of employment. (See Def.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 3, 9-10; Connaughton Decl., Exs. D, G, H.) More importantly, Defendant provides evidence, in the form of Plaintiff's deposition testimony, that Plaintiff exercised his stock options while he was employed by Defendant. (See Connaughton Decl., Ex. A at 22.) Plaintiff has failed to raise a genuine issue of material fact to show Defendant's representation was false, or that he failed to receive any stock options from Defendant. Therefore, Defendant is entitled to judgment on this instance of negligent misrepresentation.

In another instance of negligent misrepresentation, Plaintiff alleges Defendant promised Plaintiff he would not be terminated without cause. (First Am. Compl. at 9.) To support this argument, Defendant provides the Court with copies of Plaintiff's employment application and his terms of employment. The employment reads:

> In consideration of my employment, I acknowledge and agree that my employment may be terminated, with or without cause, and with or without advance notice, at any time at the option of either the Company or myself. I understand that no supervisor or representative of the Company other than the Office of the President has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement to the contrary to the foregoing.

(Connaughton Decl., Ex. C at 44.) Plaintiff's terms of employment echo his employment application. It states: "I agree that my employment with QUALCOMM will be at-will, terminable by the employee or the company with or without cause or notice. This supercedes all other agreements on this subject and can be modified only in writing and signed by the Chairman of the Board of QUALCOMM." (Connaughton Decl., Ex. E at 46.) This evidence clearly shows that Plaintiff was an at-will employee. Plaintiff fails to provide this Court with any evidence or argument to dispute this evidence. In the absence of a genuine issue of material fact on this issue, Defendant is entitled to judgment on this instance of negligent misrepresentation.

Plaintiff's final instance of negligent misrepresentation alleges Defendant promised Plaintiff he would receive stock, not stock options, upon acceptance of Defendant's offer of employment. (First Am. Compl. at 4-10; Def.'s Mem. of P. & A. in Opp'n to Mot. for Summ. J. at 5.) To support this allegation, Plaintiff provides the court with evidence of his "New Hire Authorization." (See Decl. Of Larry Barker in Opp'n to Second Mot. for Summ. J. (Barker Decl."), Ex. 2.) This document sates in the "Comments" section, "Stock Options 2200[.]" (Id.) Plaintiff declares he has seen this document, and asserts it "creates an inference that 2200 shares were authorized to me before I started work." (Brokaw Decl. At 5)

Notwithstanding Defendant's evidentiary objections to this document, there is no evidence presently before the Court to show when Plaintiff first saw this document. Defendant asserts Plaintiff never saw this document, (see Def.'s reply Br. In Support of Mot. for Summ. J. at 3 n.3), but Plaintiff's declaration is clearly to the contrary. (See Brokaw Decl. at 5.) More importantly, Defendant argues Plaintiff did not see this document during the hiring process. According to Defendant, the only written representations Plaintiff received were: 1)the Employment application, 2) the offer letter, 33) the "Terms of

Employment" agreement, 4) the employment agreement and 5) the stock option agreement. (See Def.s Mem of P. & A. in Supp. of Mot. for Summ. J. at 9-10.) Plaintiff fails to provide any evidence to dispute this, and his declaration fails to clarify when he first saw the "New Hire Authorization." In light of the evidence presently before the Court, and the absence of any mention of this document in Plaintiff's first amended Complaint, the only reasonable inference is Plaintiff was not aware of this document either before or during the hiring process. Without knowledge of this document, there is no evidence to support Plaintiff's claim that Defendant made any misrepresentation that he was to receive stock, rather than stock options, upon accepting Defendant's offer of employment.

In light of the above the Court grants Defendant's motion for summary judgment on Plaintiff's negligent misrepresentation claim.[1]

C. Promissory Fraud

In Count Five of Plaintiff's First Amended Complaint, he alleges a claim of promissory fraud. Specifically, Plaintiff contends Defendant promised his "increased compensation including substantial stock options." (First Am. Compl. at 17.) He also asserts Defendant promised that "if he accepted employment with Qualcomm, and as long as Plaintiff satisfactorily performed his job duties, Defendants would continue to employ Plaintiff, and pay to Plaintiff benefits and stock options." (Id.) Defendant argues Plaintiff has failed to provide any evidence to support this claim. Defendant also asserts this claim is barred by the statute of limitations.

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[1] Because the Court finds Plaintiff has failed to raise a genuine issue of material fact on the first two elements of his negligent misrepresentation claim, the Court does not address the issue of justifiable reliance, or Defendant's alternative argument that this Claim is barred by the statute of limitations.

"Promissory fraud" is a promise made without any intention of performing it." Pacific State Bank v. Greene, 110 cal.App.4th 375, 391 (2003) (quoting Alling v. Universal Manufacturing Corp., 5 Cal.App.4th 1412, 1436 (1992)). See also Copeland v. Baskin Robbins U.S.A., 96 Cal.App.4th 1251, 1261 (2002) (same). In this case, Defendant argues it performed it promises to Plaintiff. (See Def.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 13.) to support this argument, Defendant refers the Court to its written offer of employment, the terms of employment agreement, the employee agreement and the stock option agreement. (Id.)

In the offer letter, Defendant offered Plaintiff a position with a salary of $55,013.32. (See Connaughton Decl., Ex. D.) the employment application Plaintiff filled out indicates his salary at his previous employer was $52,936. (See Connaughton decl., Ex. C at 42.) Furthermore, the stock option agreement demonstrates Defendant granted Plaintiff an option to purchase shares of Defendant's stock. (See Connaughton Decl., Ex. G.) This evidence supports Defendant's argument that it performed its promises to Plaintiff.

In an attempt to dispute these facts, Plaintiff asserts Defendant misappropriated Plaintiff's stock, which infers fraudulent intent. (See Def.'s Mem. of P. & A. in Supp. of Opp'n to Mot. for Summ. J. at 7.) However, this bald assertion is insufficient to establish a genuine issue of material fact. Accordingly, Defendant is entitled to summary judgment on Plaintiff's first alleged instance of promissory estoppel.

Plaintiff' second alleged instance of promissory estoppel echoes his allegations of negligent misrepresentation, specifically his understanding he would not be terminated without cause. As explained above in Section III(B), however, Plaintiff has failed to provide any evidence that Defendant ever made this promise. Therefore, Defendant is

entitled to summary judgment on Plaintiff's promissory estoppel claim.[2]

D. Wrongful Termination/Age Discrimination

In Counts Two, Three and Four, Plaintiff alleges wrongful termination in violation of FEHA, the ADEA and public policy. Specifically, Plaintiff claims he was terminated because of his age. He also contends Defendant offered him a release that violated the ADEA. Defendant argues Plaintiff has failed to produce any evidence to support these claims.

1. Wrongful Termination

"Under California' s age discrimination statute, FEHA, it is 'an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age.'" Sorosky v. Burroughs Corp., 826 F.2d 794, 803 (9th Cir. 1987) (quoting Cal. Gov. Code § 12941 (West 1980 & Supp. 19878)). To determine whether Defendant is entitled to summary judgment on this claim, this Court, like California courts, looks to federal cases interpreting the ADEA. See Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996) (stating California courts look to federal cases on ADEA when interpreting FEHA claims).

To prevail on a disparate treatment claim[3] under the ADEA, a plaintiff "must offer evidence that 'give[s] rise to an inference of unlawful discrimination.'" Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1485 (9th Cir. 1986)

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[2] Because the Court finds Plaintiff has failed to raise a genuine issue of material fact on the elements of his promissory fraud claim, the Court does not address the issue of justifiable reliance, or Defendant's alternative argument that this claim is barred by the statute of limitations

[3] As mentioned above, the Court dismissed Plaintiff's second and third causes of action to the extent they relied on disparate impact theory. Therefore, the Court limits its discussion to the theory of disparate treatment.

(quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))). To raise this inference, the plaintiff must establish "a prima facie case of age discrimination by showing that he was (a) over 40 years of age (2) qualified for his position (3) discharged and (4) replaced by a substantially younger employee with equal or inferior qualifications." Mundy v., Household Finance Corp., 885 F.2d 542, 545 (9th Cir. 1989) (citing Kelly v. American Standard, Inc., 640 F.2d 974, 984 (9th Cir. 1981)). See also Sorosky, 826 F.2d at 803 (citing Cotton v. City of Alameda, 812 F.2d 1245, 1248 (9th Cir. 1987)) (same).

Defendant asserts Plaintiff has failed to establish the fourth element of this test, namely that he was replaced by a younger employee. (See Def.'s Reply Br. in Support of Mot. for Summ. J. at 8.) In response, Plaintiff declares he was told that a younger worker, Paul Repp, was to assume his job duties, and Mr. Repp performed those duties after Plaintiff was laid off. (Brokaw Decl. at 6.) However, as Defendant points out in its objections to Plaintiff's declaration, Plaintiff fails to provide any foundation for this statement. Specifically, Plaintiff fails to identify the person that provided him with this information. Furthermore, he fails to provide any evidence that this person had authority to speak on Qualcomm's behalf, or that the person had authority to bind Qualcomm to that representation. Plaintiff's failure to raise a genuine issue of material fact on this element is fatal to his wrongful termination claim.

Assuming, nonetheless, Plaintiff had presented admissible evidence on this issue, the burden would shift to Defendant "to rebut the inference of discrimination by articulating a legitimate, non-discriminatory reason for the discharge." Mundy, 885 F.2d at 545 (citing Cotton, 812 F.2d at 1248). See Nidds, 113 F.3d at 917 (citations omitted) (same). there is no question Defendant has met its burden in this case. (See Ellis Decl.) Mr Ellis declares Plaintiff was selected for inclusion in the layoff because the project for

which he was hired "was mostly over" and Plaintiff had minimal experience with the new engineering technologies. (See is. at 2.) He further states that Plaintiff's age played no part in his decision to select Plaintiff for inclusion in the layoff. (Id.)

Defendant having articulated a non-discriminatory reason for Plaintiff's discharge, the ultimate burden now shifts back to Plaintiff to "come forward with evidence that the employer's reason is a mere pretext to conceal its discriminatory motive." Sorosky, 812 F.2d at 803 (citing Cotton, 812 F.2d at 1248). To satisfy this burden, and to avoid summary judgment, Plaintiff "must produce enough evidence to allow a reasonable factfinder to conclude *either*: (a) that the alleged reason for [plaintiff's] discharge was false, *or* (b) that the true reason for his discharge was a discriminatory one." Nidds, 1123 F.3d at 918 (citing Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995)).

In this case, Plaintiff does not directly attack Defendant's discriminatory conduct.[4] A plaintiff may use

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[4] Defendant objects to Plaintiff's statistics as inadmissible under Federal Rule of Civil Procedure 26(a)(2)(B). Specifically, Defendant asserts Plaintiff's expert has failed to explain where he obtained the information relied upon for his opinions. Although Rule 26(a)(2)(B) requires experts to provide "the data of other information considered by the witness in forming the opinions[,]" this Rule does not prevent courts from considering reports that fail to include this information.

Federal Rule of Civil Procedure 37(c)(1) provides for exclusion of evidence if a party fails to disclose information required by Rule 26(a). However, there is no evidence before the Court that Defendant ever moved to exclude Plaintiff's expert report under this Rule. Plaintiff filed his first Designation of Expert Witnesses on November 25, 2002, leaving Defendant with ample time to file such a motion. In the absence of such a motion, however, Defendant has failed to establish it has been prejudiced by Plaintiff's failure to provide this information. See Paulissen v. United States Life Ins. Co., 205 F.Supp.2d 1120, 1126 (C.D. Cal. 2002) (denying motion to exclude expert witness report because plaintiff failed to prove prejudice). Accordingly, the Court overrules this objection to Plaintiff's proffered statistics.

statistics to show an intent to discriminate." Pottinger v. Potlatch Corp., 329 F.3d 740, 747 (9th Cir. 2003). See also Palmer, 794 F.2d at 539 (citing Diaz v. American Telephone & Telegraph, 232 F.3d 1271, 1283 (9th Cir. 2000) (quoting Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990)).

Plaintiff's statistics show the probability that an employee over the age of 57 would be laid off was 76.5 percent, compared to 7.8 percent for employees under the age of 57. (See Barker Decl., Ex. 1 at 1.) However, Plaintiff' statistics do not consider any factors other than age. this failure leads this Court to view Plaintiff's statistics with some skepticism. See Pottenger, 329 F.3d at 748 (stating Ninth Circuit treats statistics with some skepticism if they fail to account for factors other than age and termination). It also renders it difficult, if not impossible, for this Court to conclude that Plaintiff's statistics "show a stark pattern of discrimination unexplainable on grounds other than age.'" Coleman, 232 F.3d at 1283 (quoting Rose, 902 F.2d at 1423).

In Coleman, the court was faced with statistics that showed "64.4 percent of employees over age 40 were terminated in contrast to 36.8 percent of those under that age." 232 F.3d at 1283. However, the Ninth Circuit concluded those statistics were not enough to take the case to trial because they failed to account for many factors pertinent to the plaintiff that would have affected the results of the analysis, such as education, previous positions at the company and distribution of age groups by position. Id . Although Plaintiff's statistics in this case demonstrate a greater discrepancy than those in Coleman, Plaintiff's statistics fail to address any other factors relevant to Plaintiff. As in Coleman, Plaintiff's statistics are insufficient to avoid summary judgment in this case. Accordingly, the Court grants Defendant's motion for summary judgment on Plaintiff's wrongful termination claims.

2. Release

As mentioned above, Plaintiff also alleges Defendant discriminated against him on the basis of age when it offered him a severance package that included a release of claims. (Firs Am. Compl. at 14.) According to Plaintiff, he was required to sign the release to receive the severance package, but younger employees were not required to do so.[5]

Defendant argues the Court need not consider this claim because Plaintiff has failed to enter the release into evidence. (Def.'s Reply Br. in Supp. of Mot. for Summ. J. at 7.) However, Plaintiff's claim, as stated in the First Amended Complaint, does not rest on the terms of the release. Rather, Plaintiff complains Defendant treated older employees differently in that they were required to sign a release to receive severance benefits and younger employees were not required to do so. Unlike the wrongful termination claim discussed above, this claim appears to allege that Plaintiff was denied a "privilege of employment" based on his age. See 29 U.S.C. § 623(a)(1) (stating it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]")

Defendant does not dispute that it offered Plaintiff a severance package. (See Def.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 5.) More importantly, however, Defendant does not dispute it required older employees to sign a release in order to receive a severance package but did not require younger employees to do the same. Furthermore, Defendant offers no legitimate reason for this disparate treatment. Therefore, genuine issues of material fact exist,

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[5] In his opposition to the motion for summary judgment, Plaintiff alleges the release was "illegal in that [it] prohibited older workers from filing claims with the EEOC[.]" (Def.'s Mem. of P. & A. in Opp'n to Mot. for Summ. J. at 9.) He also claims Defendant violated the ADEA by failing to provide proper statistical data. (Id. at 10.) Plaintiff did not include these allegations in his First Amended Complaint. Therefore, the Court does not address them here.

and Defendant has failed to show it is entitled to judgment as a matter of law. Accordingly, the Court denies Defendant's motion for summary judgment on this particular claim of age discrimination.[6]

E. Unfair Business Practices (California Business and Professions Code Section 17200)

In his sixth cause of action, Plaintiff alleges Defendant violated California Business and Professions code Section 17200. (First Am. Compl. at 19-22.) Specifically, he asserts Defendant (1) fraudulently promised prospective employees compensation with no intent to pay the compensation, (2) terminated employees on the basis of age, (3) required older employees to sign waivers that were not required of younger employees, and (4) violated California Labor Code Section 970. (Id. at 20-21.) Defendant raises several argument in support of its motion for summary judgment on this claim.[7]

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[6] DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995), cited by Defendant in its Reply Brief, does not alter this conclusion. First, Defendant cites this case to support its argument that employers are not required to provide "extra" consideration for an ADEA waiver. (See Def.'s Reply Br. in Supp. of Mot. for Summ. J. at 7.) Although Plaintiff includes this allegation in his opposition to the motion for summary judgment, he fails to include this allegation in his First Amended Complaint. Therefore, the Court does not address that claim here. See King v. Atiyeh, 814 f.2d 565, 567 (9th Cir. 1996 (stating all causes of action or claims not alleged in amended complaint are deemed waived). Second, in DiBiase, the defendant-employer offered the same separation benefit plan to all employees, thereby "treating older workers the same as younger workers." Id. at 722, 727. In this case, Plaintiff makes the opposite allegation, namely that Defendant treated older workers differently from younger workers by requiring that older workers sign a release in order to receive a severance package, but not requiring the same release from younger employees.

[7] To the extent this claim relies on Defendant's fraudulent misrepresentation or wrongful termination of Plaintiff, the Court grants

First, Defendant argues the purpose of Section 17200 is to prevent harm to consumers or competitors, therefore it is an inappropriate vehicle in light of the circumstances. (Def.'s Mem. of P. & A. in supp. of Mot. for Summ. J. at 18.) This argument, however, has been raised in another case and rejected. See Herr v. Nestle, 109 cal.App.4th 779 (2003). In Herr, the plaintiff filed suit against his former employer alleging age discrimination and unfair competition under Section 17200. Id. at 786. the defendant in that case argued "the unfair competition law is intended to protect consumers and competitors[.]" Id. at 789. However, the court found that argument "meritless." Id. It explained the remedies available for a violation of Section 17200 were cumulative to remedies available under other laws. Id. It also stated the plaintiff had a right to sue his former employer under Section 17200 "as a private attorney general[.]" Id. at 790. Therefore, this argument does not entitle Defendant to summary judgment on this claim.

Defendant also argues Plaintiff has not, and cannot, state a violation of California Labor Code Section 970.[8]

Defendant's motion for summary judgment for the reasons discussed in Sections III(B)-(D)(1) above.

[8] This statue provides,

> No person or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:
> (a) The kind, character, or existence of such work;
> (b) The length of time such work will last, or the compensation therefore;
> (c) The sanitary or housing conditions relating to or surrounding the work;
> (d) The existence of nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed

Specifically, Defendant asserts Plaintiff has failed to establish he relocated to accept employment with Defendant, and furthermore, there is no evidence Defendant made any misrepresentation to Plaintiff concerning his employment.

Plaintiff concedes he "did not but his house in a closer city to accept the job" with Defendant, but asserts that other individuals may have relocated to accept employment with Defendant. (Def.'s Mem. of P. & A. in Supp. of Opp'n to Mot. for Summ. J. at 13.) Plaintiff's assertion about other individuals, however, is pure speculation and is irrelevant. Therefore, California Labor code Section 970 cannot serve as the basis for Plaintiff's unfair business practices claim.

The only remaining theory for Plaintiff's unfair business practices claim is that Defendant treated older employees differently from younger employees by requiring them to sign releases to receive severance packages. Defendant does not address this allegation. rather, it asserts there is nothing unlawful about offering releases to employees. although Defendant may be correct, as discussed above in Section III(D)(2), it fails to explain why it offered releases to older employees, but did not offer them to younger employees. Accordingly, the Court denies Defendant's motion for summary judgment on Plaintiff's unfair business practices claim to the extent it relies on Plaintiff's age discrimination claim discussed in Section III(D)(2).

F. Unjust enrichment

In Count Seven, Plaintiff alleges a claim for unjust enrichment. He specifically alleges Defendant misrepresented "material facts regarding Plaintiff's longevity of employment and ability to participate in Defendants' stock plan." (Firs Am.

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employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

Cal. Labor Code § 970.

Compl. at 22.) This claim appears to rest on the same facts as Plaintiff's negligent misrepresentation and promissory estoppel claims. Therefore, for the reasons discussed in Section III(A) and (B) above, the Court grants Defendant's motion for summary judgment on Plaintiff's unjust enrichment claim.

G. Declaratory Relief

As with the unjust enrichment claim, Plaintiff's declaratory relief claim rests on the same facts as Plaintiff's negligent misrepresentation, promissory estoppel and wrongful termination claims. Because the Court grants Defendant's motion for summary judgment on these claims, the Court also grants Defendant's motion for summary judgment of Plaintiff's declaratory relief claim.

IV.

CONCLUSION AND ORDER

For all the foregoing reasons, the Court GRANTS in part and DENIES in part Defendant's Motion for Summary Judgment [Doc. No. 90]. specifically, the Court (1) GRANTS Defendant's motion for summary judgment of Plaintiff's negligent misrepresentation claim, (2) GRANTS Defendant's motion for summary judgment on Plaintiff's promissory estoppel claim, (3) GRANTS Defendant's motion for summary judgment on Plaintiff's FEHA claim, (4) DENIES Defendant's motion for summary judgment on Plaintiff's ADEA claim, (5) DENIES Defendant's motion for summary judgment on Plaintiff's public policy clam, (6) GRANTS in part and DENIES in part Defendant's motion for summary judgment on Plaintiff's unfair business practices claim, (7) GRANTS Defendant's motion for summary judgment on Plaintiff's unjust enrichment claim, and (8) GRANTS

Defendant's motion for summary judgment on Plaintiff's declaratory relief claim.

IT IS SO ORDERED.

DATED: 10-30-03

"s/
DANA M. SABRAW
UNITED STATES DISTRICT JUDGE

CC: ALL PARTIES
Judge Battaglia